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Clair Gammage*

Overcoming the development deficit of Article XXIV: Promoting equality through North-South RTAs

Abstract

Regionalism has been conceptualised as a development strategy for integrating developing countries into the global economy, and there has been an increase in the number of North-South regional trade agreements (RTAs) being negotiated among WTO Members. Notified under Article XXIV GATT 1994, members of North-South RTAs must liberalize substantially all trade on a reciprocal basis, within a reasonable period of time, irrespective of their development status. Challenging the assumptions on which North-South regionalism rests, this article submits that Article XXIV has created a regulatory framework that sustains a monocultural conception of development which is synonymous with economic growth. Rejecting the economic model, this article argues that development should be understood as a multidimensional process, with an emphasis on equality of opportunities for all countries. Through a deconstruction of the textual interpretation of Article XXIV, and by analysing the practical application of this provision in the EU-ACP Economic Partnership Agreements, the gradual erosion of development from the process of trade liberalisation will be revealed. This article argues that the 'rationalizing spell' of legal formalism must be broken in order to reinterpret the legal framework, so that a concept of development, grounded in equality, is facilitated by the multilateral trading system.

Introduction

Regionalism has changed the cartography of international trade over the past two decades, with the number of regional trade agreements (RTAs) proliferating at an unprecedented rate. In part a symptom of the suspended Doha Development Round, regionalism has been perceived as an attractive alternative to multilateral trade liberalisation.¹ As the political economy of

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¹ Paragraph 2(c) of the Enabling Clause offers an alternative legal framework for RTAs negotiated between developing countries and LDCs, which sets a much lower threshold for liberalization than that of Article XXIV.

regionalism continues to evolve, regionalism has been perceived as an effective development strategy for integrating developing countries into the global economy, and the negotiation of North-South regional arrangements has become increasingly common.

North-South RTAs are regulated by Article XXIV GATT 1947, which requires reciprocity of liberalisation among members across ‘substantially all trade’ and within ‘a reasonable period of time’. Reciprocity implies a mutual bargaining strategy between nations, and refers to ‘exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good and bad for bad.’² However, the extent to which countries may derive benefit from equivalent exchange and mutual cooperation is questionable, particularly in the context of reciprocal, albeit asymmetric, North-South RTAs.

Bringing development back to the ‘heart’ of the WTO is a stated objective of the Doha Development Agenda. It is an aim of the Doha Round to ‘ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.’³ With an increasing number of developing countries negotiating regional arrangements with developed countries, the question of whether regionalism, in its current construction, facilitates development becomes ever more important. Drawing on the work of Amartya Sen and Roberto Mangabeira Unger, this article challenges the monocultural doctrine of development as economic growth, and proposes that development should be understood as a diverse process for social and economic emancipation. Conceptualizing development solely as an economic process obscures the complexities of development, both as a process and as a discourse. This article argues that the flourishing of regionalism has eroded the concept of equality and freedom in the multilateral system, with potentially adverse implications for developing countries.

Through a deconstruction of Article XXIV, it will be argued that the dominant members of the WTO have encouraged a formalist understanding of the legal framework, which has in turn restricted negotiating space for developing countries seeking partnership with developed countries. Challenging the assumptions on which the legal framework is based, this article proposes that the meaning of ‘development’ at the WTO level should be interpreted to promote

However, this framework is not available to North-South RTAs, which by their very nature consist of at least one developed country.

² R.O. Keohane, ‘Reciprocity in International Relations’ 40 (1986) *International Organization*, 8.

³ WTO, ‘Doha Ministerial Declaration’ WT/MIN(01)/DEC/1 of 20 November 2001, para 2.

values as ‘freedom’ and ‘equality’, and not solely economic growth. Until the assumptions on which the trading system rest are challenged, developing countries in North-South RTAs could stand to lose out on important economic and social opportunities. That the language of Article XXIV has been interpreted in a narrow sense is widely acknowledged,⁴ but the extent to which this has negative effects for development (broadly understood) is relatively under-researched. There seems little prospect for revision of the GATT, and with increasing emphasis on liberalisation in RTAs beyond trade in goods towards broader issues such as sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT) and labour standards through regional trade, it is time to explore alternative avenues for promoting development.

One notable shift towards a more inclusive approach to development trade can be seen in the EU’s recent Economic Partnership Agreements (EPAs) and other bilateral agreements. Since the 1990s, the EU has sought to bridge the gap between a purely economic approach to liberalisation and the protection of human rights and the environment.⁵ The shift towards ‘sustainability’ has been reinforced through the Commissions ‘Europe 2020’ Strategy,⁶ which, through its external trade policy, aims to ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.’⁷ While the WTO rejected the call for a multilateral social clause,⁸ the inclusion of so-called ‘social clauses’ and ‘development’ chapters into North-South agreements could offer an alternative means through which to realise development in the broad sense.

This article is divided into four sections. The first section outlines the dominant economic ideology underpinning development, as a process and a discourse, facilitated by the rational construction of legal analysis perpetuated through WTO jurisprudence and policy. Herein, a transformative model of development will be explored, which challenges the orthodox view of

⁴ For an excellent account of the interpretation of Article XXIV see: Z.Hafez ‘Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs’ (2003) *North Dakota Law Review* 79: 879-919.

⁵ L.Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ (September 2012) *Legal Studies Research Paper Series, University of Cambridge Faculty of Law*, Paper No. 24/2012.

⁶ European Commission, ‘Communication from the Commission: Europe 2020: A Strategy for smart, sustainable and inclusive growth’ COM (2010) 2020 Final (3 March 2010) available online at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>> accessed on 30 August 2015. For a brief synopsis of the 2020 Strategy see: http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm

⁷ Article 21(1)(d) TEU.

⁸ At the 1999 Seattle Ministerial Conference, the EU and US proposed the inclusion of a social clause at the multilateral level. For a critical analysis of this proposal, see: C. Summers, ‘The Battle in Seattle: Free Trade, Labor Rights and Societal Values’ (2001) *University of Pennsylvania Journal of International Economic Law* 22, 61.

law and development. The second section provides an overview of the regulatory framework governing the creation of regional arrangements and problematizes the concept of regionalism as a development strategy. The third section explores the nature of North-South RTAs as ‘drivers of development’, and with reference to the EPAs negotiated between the EU and African, Caribbean, Pacific (ACP) States, questions the extent to which reciprocal, but asymmetric, trade liberalisation facilitates development. The final section critically reflects on the limitations of Article XXIV and examines whether a ‘development-friendly’ approach to regional trade, through the inclusion of social clauses and development chapters, is likely to promote development in the broad sense.

I. Constructing Development Through Law

This section analyses the relationship between law and development, and examines the model of development facilitated by the law at the WTO. It is herein submitted that legal reasoning can play a defining role in promoting a particular concept of development. At this juncture, it is worthwhile reflecting on how the economic model of development has become dominant *in*, and *through*, legal discourse.

‘Development’ is generally understood to be both a process and a discourse, but has been conceptualized from many theoretical perspectives.⁹ As a discourse, development comprises a set of ‘knowledges, interventions and world views’ although it is neither a ‘benign nor innocent’ vision.¹⁰ The earliest evidence of development as a discourse is found in moral philosophy and ethics,¹¹ but the first significant paradigmatic shift in development theory came with the influential work of Adam Smith¹² and David Ricardo,¹³ whose collective work focused on the economic value of development. While both Smith and Ricardo promoted the ideology of free trade, the concept of comparative advantage was introduced by Ricardo, and this remains a cornerstone of the multilateral system today. Development as economic growth has evolved over time, shifting from the state-centric vision of classical economics¹⁴ to one of

⁹ For a comprehensive analysis of theories of development, see: V. Desai & R.B.Potter (eds) *The Companion to Development Studies* (3rd edition, Abingdon and New York: Routledge, 2014).

¹⁰ J. D. Sidaway, ‘Post-Development’ in V. Desai & R.B.Potter (eds) *The Companion to Development Studies* (3rd edition, Abingdon and New York: Routledge, 2014), 227.

¹¹ Early ethical inquiry associated development as achieving a state of ‘happiness’ and living ‘the good life.’ For example, a concept of development can be seen in Aristotlean virtue ethics in his concept of *eudaimonia*. See: C. Corder ‘Aristotlean Virtue and Its Limitations’ (1994) *Philosophy* 69:269, 291-316.

¹² A.Smith, *Wealth of Nations* (London: Wordsworth Editions Ltd, 2012) first published 1776.

¹³ D.Ricardo, *On the Principles of Political Economy and Taxation* (Dover: Dover Publications, 2004), first published 1817.

¹⁴ For a comprehensive overview of classical theory, see: J. Ravenhill, *Global Political Economy* (3rd edition, Oxford: OUP, 2011).

minimal state intervention advocated by liberalism.¹⁵ Rejecting the ethical notions of development as freedom, economic models promote a shared vision of development focused on production, efficiency and wealth maximization through the functioning of markets.

A notable shift in economic development theory came in the 1970s, with the concept of ‘market fundamentalism’, a theory based on the assumption that free markets will encourage an efficient allocation of resources, becoming increasingly fashionable. In recent times, we have witnessed an increasing differentiation within the global economy and a growing number of international institutions¹⁶ has made the question of ‘who governs’ ever more complex. Institutions have assumed a central position in the global order and set ‘the rules of the game of society’¹⁷ providing a framework for efficient production, ensuring the maximization of capital and investment flows. Market fundamentalism, as a development strategy, was crystallised through the Washington Consensus,¹⁸ which was a programme of economic reform focusing on macroeconomic stabilization, free trade and market integration. Although ‘neoliberalism’ is itself a contested concept¹⁹ it broadly refers to a set of economic policies and prescriptions that have become the dominant ideology over the past twenty-five years. Neoliberalism proposes that power and wealth are concentrated in multinational corporations and transnational networks.²⁰ The role of the state is minimal, with intervention in the global economy from government agencies considered to be most undesirable.²¹ The pursuit of economic freedom is key, with institutional frameworks ‘characterised by strong private property rights, free markets, and free trade.’²²

¹⁵ For an account of liberalism and multilateralism, see: A. Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ (1997) *International Organisation* 51:4, 513-566.

¹⁶ Robert Keohane, a leading liberal institutionalist, defines an ‘institution’ as a ‘general pattern or categorization of activity or to a particular human-constructed arrangement, formally or informally organised’. See R.O.Keohane, ‘International Institutions: Two Approaches’ (1988) 32 *International Studies Quarterly* 386.

¹⁷ D.C.North ‘The new institutional economics and Third World Development’ in J. Harris, J.Hunter & C.M.Lewis (eds) *The New Institutional Economics and Third World Development* (London: Routledge, 1995), 23.

¹⁸ The term was first coined by American economist, John Williamson, to describe these economic prescriptions. Over time, the term has become associated with the broader neoliberal trade agenda, in spite of Williamson’s objections.

¹⁹ There is no single definition of ‘neoliberalism’ and it is not a homogenous philosophy. For an excellent overview of the differing accounts of neoliberal thought, see: A.Saad-Filho & D.Johnston, *Neoliberalism: A Critical Reader* (London: Pluto Press, 2005).

²⁰ A. Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (Oxford: OUP, 2011).

²¹ R. Munck ‘Neoliberalism and Politics, and the Politics of Neoliberalism’ in A.Saad-Filho & D.Johnston, *Neoliberalism: A Critical Reader* (London: Pluto Press, 2005), 60-69. See also, R.Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974).

²² D. Harvey, *A Brief History of Neoliberalism* (Oxford: OUP, 2005), 2.

With the growing prominence of international institutions came a renewed interest in the relationship between law and development. Scholars of law and development propose that the legal reforms can be used as a ‘development strategy.’²³ The dominant view, known as the ‘economic’ or ‘instrumentalist’ approach, is perhaps best articulated by Max Weber, one of the founding fathers of modern sociological thought. Weber explored different archetypes, or ‘ideal types’, of law which would support and facilitate economic production and noted that the *rationalization* of law created a more predictable and stable environment. A lack of rationality implies a state of chaos under which capitalism would collapse. Central to Weber’s thesis is the concept of authority, and in the legal-rational typology of law authority is found in the impartiality of legal rationality and officials act with ‘formalistic impersonality’.

Weber proposes that economic forces only indirectly affect the legal system and in this sense, the law is relatively autonomous. Law is related to, but not determined by, economic forces. Formally rational law is a precondition of capitalism because it provides the necessary certainty and predictability required for efficient production, because a capitalist market requires certainty and stability. In *Protestant Ethic*, his work culminates in the haunting analogy to an ‘iron cage’ enclosing society once we reach an extreme state of rationalization, whereby society loses its sense of meaning and freedom. Legal formalism understands the role of law not only as establishing legal doctrines which maintain the ‘distribution of economic and political power’ but as ‘actively promot[ing] legal redistribution of wealth against the weakest groups in society.’²⁴ The law, when interpreted in a formal way, is considered to be predictable, inflexible and self-contained. To this end, legal formalism can serve to facilitate, reinforce and exacerbate power asymmetry between regional partners.

That the WTO and other global institutions adopt a neoliberal ideology is self-evident. Over time, the economic measure of development has become the norm of international financial institutions and since the late 1940s, the global financial institutions, such as the World Bank and the International Monetary Fund (IMF), have used the measure of ‘gross domestic product’ (GDP) per capita to determine the development status of every country. The World Bank classifies countries as ‘high-income’, ‘middle income’, ‘low-middle income’ and ‘low-income’, depending on their measure of GDP per capita.²⁵ In the WTO, it is for each Member

²³ M.Trebilcock & M.M.Prado, *An Advanced Introduction to Law & Development* (Cheltenham: Edward Elgar, 2014), 47.

²⁴ M.Horwitz, ‘The Rise of Legal Formalism’ (1975) *The American Journal of Legal History*, 19:4, 251-264.

²⁵ Interestingly, the WTO does not provide a classificatory framework and instead allows each country to determine its own development status.

to determine their own development status, although the World Bank framework remains influential.

a. Breaking the Rationalizing Spell of Law

Although the dominant economic ideology has become embedded into the international legal framework, competing theories of development have emerged which seek to reveal the multifaceted nature of development. It is widely acknowledged that the global economy is riddled with inequality – political, economic and social - and the polarity of wealth within a population, be it local or global, raises issues of distributive justice.²⁶ Challenging the rational construction of economic development, neo-Marxist dependency theory proposes that society is stratified according to an unequal distribution of wealth. As each group seeks to advance their own interest against rival groups, a social structure begins to emerge distinguishing a dominant class from the subordinate class. The dominant class seeks to protect its position and will use the law as ideology to ensure the social stratification remains intact.²⁷ Law, in this sense, becomes an instrumental tool for domination.

It is argued that market fundamentalism has proven a successful project because for the past 60 years because we, as a global community, have been led to believe that capitalism is the *only* way for countries to develop. Whether knowingly or not, the concept of development as economic growth has become an accepted part of our vernacular. So far, the catastrophic nature of capitalism predicted by traditional Marxist thought has been avoided although admittedly, there have been notable market failures including the most recent financial crises. Nevertheless, we nevertheless remain under the capitalist spell.

Moving away from the consequentialist theories of justice, Amartya Sen argues that the focus of development should be on human capabilities to achieve a life that each individual values

²⁶ Utilitarianism conceptualizes development as a measure of maximizing utility. Developed primarily through the works of Jeremy Bentham and John Stuart Mill classical utilitarianism is a theory of distributive justice where the state is warranted for maximizing human “well-being”. When the balance of pleasure over pain is as great as it can be this is maximizing social utility. Utilitarianism deals with the sum total rather than the distribution at the micro-level and therefore arguably it does not respect rights of everyone, but just the majority. For Rawls, development is rooted in social contract and requires the redistribution of ‘primary goods’ in accordance with the ‘difference principle’ to ensure that the least advantaged in society are looked after. Under a Rawlsian framework, individual liberty is given lexical priority over equality but nevertheless, redistribution of assets is a key part of a functioning society. His theory is procedural in nature, concerned with the processes necessary to promote a more equitable distribution of wealth within society. But, much like the libertarian school, Rawls’ theory of justice fails to address the consequences that flow from his procedural approach.

²⁷ A.Hunt, ‘Problems of the State: Law, State and Class Struggle’ (1976) *Marxism Today* 178-187.

and, in order to do so, the means to realizing substantive freedom must be established.²⁸ Contesting the instrumentalist view that places emphasis on contractual obligations and property rights, this approach proposes that the rule of law may be considered to be both a ‘means’ to development but also a ‘justified end’ of development. Bridging the schools of ethics and economics, Amartya Sen proposes a theory of development where freedom is both the principal means and end of development.²⁹ Moving against the orthodox instrumentalist view that assumes economic growth will promote other substantive freedoms, Sen argues that these values should be seen as primary goals which will in turn stimulate growth. Development is conceptualized as ‘a process of expanding the real freedoms that people enjoy’³⁰ with economic growth perceived as a ‘means’ towards the realization of those substantive freedoms. Agency plays a central role in Sen’s concept of development, with his ‘capability approach’ offering an alternative to neoclassical economic thought. A theory of welfare economics, Sen’s approach is rooted in the idea that each individual has the capability to achieve the type of life that they value.

Sen identifies five types of distinct, but interrelated, freedoms that advance the capabilities of a person: political freedom, economic facilities, social opportunities, transparency guarantees, and protective security.³¹ Development as a process should play an instrumental role in promoting these freedoms so that people can have lives that they value:

‘Expanding the freedoms that we have reason to value not only makes our lives richer and more unfettered, but also allows us to be fuller social persons, exercising our own volitions and interacting with – and influencing – the world in which we live.’³²

Experience has shown that promoting economic freedom can, in fact, lead to substantive unfreedom(s). For example, Angola is classified as an ‘upper-middle’ income country by the World Bank because of its huge income generated by oil revenues each year. This implies significant economic freedom. However, the Multidimensional Poverty Index shows that approximately 77 percent of the Angolan population live below the poverty line,³³ which suggests the majority of the population experience substantial unfreedoms. This illustrates the

²⁸ M. Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) *Feminist Economics* 9, 33.

²⁹ A. Sen, *Development as Freedom* (Oxford: OUP, 2001).

³⁰ *Ibid.*, 3.

³¹ *Ibid.*, 10.

³² *Ibid.*, 16-17.

³³ Oxford Poverty and Human Development Initiative (OPHI), ‘Country Briefing: Angola’ (July 2010) available at <www.ophi.org.uk/wp-content/uploads/Angola.pdf> accessed on 20 March 2015.

danger of conceptualizing development through a purely economic lens because it leads to a skewed vision of the nature of development.³⁴

This leads us to the question of what role international economic law can play in promoting the realization of not only economic freedom, but social and political freedom. Roberto Mangabeira Unger proposes that the role of the legal thinker is to develop a theory of law that does ‘justice to social-democratic commitments’.³⁵ While the practice of judicial precedent does not formally operate at the WTO’s dispute settlement system, the jurisprudence of the DSB suggests that disputes are decided on the basis of analogy. This historically situated method of legal reasoning is widely practiced across the world, for example in the United States and the United Kingdom,³⁶ with the objective of reducing anomaly and legal indeterminacy. Rational reconstruction of legal analysis through this method constrains the possibility for imaginative reinterpretation of legal principles and doctrines, perceiving anomalous principles as ‘mistaken’ and ‘intellectual and political threats rather than intellectual and political opportunities’.³⁷ This article argues that the method of legal analysis in the WTO is rationally constructed, and restricts the possibility for transformative discovery of alternative legal methods.

Acknowledging the constraints of historically situated legal analysis, and abandoning the assumptions of neoliberalism, enables alternative visions of development to be explored. This article does not deny the importance of economic growth as an integral part of any model of development; rather, it argues that economic value is not the *sole* factor of development, nor should it necessarily take priority over other considerations. As outlined above in the case of Angola, the experience of many developing countries is one of struggle – a struggle to eradicate inequality and to overcome the crises created from a lack of resources. Economic development simply cannot be facilitated in such environments. Exploring alternative perspectives emancipates us from our existing bounded understanding of law and development. Revealing the unfreedoms perpetuated by the multilateral trading system, and in particular exploring the implications of economic unfreedom for developing countries, enables the discourse of development to be transformed.

³⁴ Nevertheless, there are some success stories of how an emphasis on aggressive economic liberalization can lift people out of poverty. For example, the East Asian ‘Tigers’ have experienced unprecedented growth through the adoption of unilateral liberalization policies.

³⁵ R.M.Unger, *What Should Legal Analysis Become?* (London: Verso, 1996), 35.

³⁶ C.Sunstein, ‘On Analogical Reasoning’ 106 (1993) *Harvard Law Review*, 741.

³⁷ See Unger, above n30, 40.

For a more inclusive vision of development to be accepted, one that shifts the focus away from development as a purely economic process, to one that reveals the emancipatory potential of development as a process of freedom and equality for those participating in the multilateral trading system, the legal framework needs to be reinterpreted. However, as this article argues, revision of the GATT is simply not on the agenda. To overcome the inherent development deficit of Article XXIV, and against the backdrop of a formalist legal framework, alternative means through which development as freedom can be promoted are required. Alternative measures may include the inclusion of social clauses and development chapters, provided that they are not couched in ambiguous terms, and this will be considered later in this article. In the following section, the legal bases of regionalism will be explored and the assumptions on which the legal framework will be revealed.

II. Regionalism as a Development Strategy

Regionalism as a development strategy has been a stated goal of the WTO, as noted at the Singapore Ministerial Conference:

‘...trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalisation and may assist least-developed, developing and transition economies in integrating into the international trading system.’³⁸

Regionalism presents both opportunities and challenges to the multilateral trading system and the broader international order. In short, RTAs offer ‘speed and flexibility’³⁹ in trade liberalization, although the rules relating to RTA formation are ambiguous, particularly in relation to North-South RTAs. This section explores the historically situated nature of the legal rules, and proposes that the formalist interpretation of Article XXIV has resulted in a legalisation, and rational construction, of regionalism.

Article XXIV of the GATT 1994 provides the legal basis for creating regional agreements, where at least one member of the regional group is a developing country. It permits derogation from the principles of MFN and non-discrimination on the assumption that trade will be increased by promoting the regional interdependence of countries, through customs unions and

³⁸ WTO, Singapore Ministerial Declaration, adopted 13 December 1996 (WT/MIN(96)/DEC).

³⁹ R.V.Fiorentino, J.Crawford & C.Toqueboeuf, ‘The Landscape of Regional Trade Agreements and WTO Surveillance’ in R.Baldwin & P.Low (eds) *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: CUP, 2009), 29.

free trade areas. Article XXIV:4 sets out, in purposive language, the general philosophy on regionalism in the multilateral trading system:

‘[WTO] Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of countries parties to such agreements. They also recognise that the purpose of a customs union or a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other [WTO] Members with such territories.’

Regionalism has therefore been conceptualized as a means towards ‘freedom’, through closer integration between Members. However, in the following two sections it will be shown that the rational construction of regionalism tends to increase *economic* freedom for the most powerful Members of the group, be it a customs union or a free trade area (FTA). This serves to exacerbate existing power disparity in the multilateral order. Customs unions are created where the Members liberalise trade internally while maintaining a common external tariff with all non-Members.⁴⁰ FTAs exist where Members liberalise trade internally but maintain their own individual external barriers to non-Members.⁴¹ As there is no harmonised external policy with non-Members, rules of origin (ROO) become important policy instruments for preventing the transshipment of goods and trade deflection.⁴² To date, the majority of North-South RTAs are FTAs.

Defined in Article XXIV:8, the creation of a customs union or free trade area requires liberalisation of ‘duties and other restrictive regulations of commerce...with respect to *substantially all the trade*’ between members.⁴³ However, the legal text does not provide any guidance as to what constitutes a ‘restrictive regulation of commerce’⁴⁴ or ‘substantially all trade’. The scope of Article XXIV was examined by the panel and Appellate Body in the

⁴⁰ Article XXIV:5(a) in relation to customs unions states that ‘The duties and other regulations of commerce imposed at the institution...shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union...’.

⁴¹ Article XXIV:5(b) provides that ‘...the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade areas...shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territory prior to the formation of the free-trade area...’

⁴² P.Krishna ‘Understanding Rules of Origin’ in A. Estevadeordal, O.Cadot, A. Suwa-Eisenmann & T.Verdier (eds), *The Origin of Goods: Rules of Origin in Regional Trade Agreements* (Oxford: OUP, 2006), 20.

⁴³ Article XXIV:8(a) and Article XXIV:8(b), emphasis added.

⁴⁴ For a discussion of the potential implications of the interpretation of Article XXIV:5(a) in relation to ‘other restrictive regulations of commerce’ for developing countries, see V.Mosoti, ‘Africa in the First Decade of WTO Dispute Settlement’ (2006) *JIEL* 9, 449.

Turkey-Textiles dispute, and although the ‘substantially all trade’ requirement was not directly at issue in the case, the Appellate body made some notable comments on this aspect of the provision. It explained that ‘substantially all trade’ is ‘not the same as *all* the trade, and...is something considerably more than merely *some* of the trade.’⁴⁵ Furthermore, the Appellate Body noted that Article XXIV is ‘flexible’ but that its flexibility is limited by the requirement that ‘duties and other restrictive regulations of commerce’ be eliminated with respect to ‘substantially all trade’.⁴⁶ While Article XXIV has been invoked as a defence in subsequent cases, such as *Argentina – Footwear*⁴⁷ and *Brazil – Retreaded Tyres*⁴⁸, there has been no further clarification offered as to what will satisfy the conditions of Article XXIV.

The failure to explicitly define what constitutes ‘substantially all trade’ has resulted in uncertainty as to the legal parameters of this internal requirement.⁴⁹ Historically, the EU proposed a benchmark figure of 80 percent liberalisation as satisfying the requirement during its dialogue with the Overseas Association.⁵⁰ Today, the EU defines ‘substantially all trade’ as constituting 80-90 percent of liberalisation,⁵¹ as evidenced in the recently negotiated EPAs.⁵² Australia, on the other hand, offers a more ambitious interpretation and proposes that 95 percent of tariff lines should be liberalised in order to satisfy the ‘substantially all trade’ requirement.⁵³ Such divergent approaches create confusion and uncertainty as to what properly constitutes a legally compliant level of liberalisation.⁵⁴

⁴⁵ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, para 48.

⁴⁶ *Ibid.*

⁴⁷ Appellate Body Report, *Argentina – Footwear (EC)*, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R adopted on 12 January 2000.

⁴⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted on 17 December 2007.

⁴⁹ See: K.Dam, ‘Regional Economic Arrangements and the GATT: The Legacy of a Misconception’ (1963) 30 *The University of Chicago Law Review*, 615-665; J.Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (TMC Asser Press: The Hague, 2002); J.T.Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: CUP, 2011); J.Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford: OUP, 2008).

⁵⁰ ; J.Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (TMC Asser Press: The Hague, 2002), 67.

⁵¹ In practice, the EU calls for approximately 90 percent liberalization overall between the Members. In the case of the Trade Development Cooperation Agreement, between the EU and South Africa, the EU liberalized 98percent of tariffs while South Africa liberalized 82 percent, to bring the overall total level of liberalisation to 90 percent.

⁵² Traidcraft, ‘Economic Partnership Agreements: Building or Shattering African Regional Integration?’ Traidcraft Report (May 2007), available at:

<http://www.stopepa.de/img/traidcraft_et_al_building_or_shattering.pdf> accessed on 20 March 2015.

⁵³ WTO, Communication from Australia, Addendum, WT/REG/W/22/Add.1, 24 April 1998.

⁵⁴ Reading Article XXIV in light of its associated Understanding suggests that sectoral exclusion is not permitted. The Preamble to the Understanding recognises the contribution of RTAs to the expansion of world trade is ‘diminished if any *major sector* of trade is excluded.’

Although the jurisprudence relating to Article XXIV is limited, it does offer some insight into the interpretive dimension of this provision and suggests a gradual ‘legalization’ and rationalization of Article XXIV.⁵⁵ The implication of this is that, for many years now, WTO Members have been creating RTAs without knowing whether they are, *sensu stricto*, compliant with the legal framework.⁵⁶

Article XXIV rests on the assumption that trade is reciprocal: countries each agree to open their markets to one another, on the basis that ‘substantially all trade’ is liberalized within that regional space. In trade terms, the word ‘reciprocity’ implies granting mutual concessions with equally beneficial gains to be made by all. The construction of this term assumes homogeneity of production potential and opportunity, overlooking the socio-economic reality of development among vastly heterogeneous trading states. That said, it has historically been practice in North-South cooperation for developed countries to offer preferential access to their markets for developing countries. The legal basis for non-reciprocal and preferential treatment was rooted in the idea that the ‘rich’ can help the ‘poor’ through some kind of ‘welfare obligation’ at the multilateral level.⁵⁷ This was the dominant ideology in the post-colonial GATT policy and has characterised North-South relations to the current day. Rather than helping developing countries integrate into the global economy, preferential trade deepened post-colonial dependencies and further isolated developing countries from the rest of the globalising world.

The legitimacy of non-reciprocal terms of trade was challenged in the long-running, and now infamous, *EC-Bananas* dispute.⁵⁸ Developing countries are now under greater pressure to negotiate ‘WTO compatible’ agreements, albeit the true meaning of this concept has become increasingly obfuscated. Given that there is uncertainty as to what constitutes ‘substantially all trade’, coupled with the fact that the trade relationship should be based on reciprocal, albeit asymmetric, non-preferential terms, it is perhaps unsurprising that there are concerns relating to the nature of ‘North-South’ RTAs notified under Article XXIV. The shift from non-

⁵⁵ J. Mathis ‘The ‘Legalization’ of GATT Article XXIV – Can Foes Become Friends?’ in K. Bagwell and P. Mavroidis (eds), *Preferential Trade Agreements: A Law and Economics Analysis* (Cambridge: CUP, 2011).

⁵⁶ For a comprehensive discussion of how Article XXIV is interpreted in practice, see: South Centre, ‘Article XXIV and RTAs: How Much Wriggle Room for Developing Countries?’ *Analytical Note* SC/AN/TDP/RTA, December 2008.

⁵⁷ R. Hudec, *Developing Countries in the GATT Legal System*, 2nd edition (Cambridge: CUP, 2011).

⁵⁸ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R.

reciprocity to reciprocal trade is a huge step for developing countries that have become reliant on the preferential treatment they have received to date.

Reciprocity is not necessarily synonymous with equality and fairness, especially in the context of North-South RTAs where one party is likely to be in a dominant position vis-à-vis the other Members. Hegemony poses a challenge to the project of regionalism.⁵⁹ In the context of North-South regional arrangements, where cooperation exists between actors of different geographic scale and economic strength, it is often the weaker actor (developing countries) that will make the greatest concessions. Inevitably, this perpetuates power asymmetry and *unequal* partnerships.⁶⁰ Within a regional configuration, hegemons are pivotal to the direction of the regional agenda and it is likely to seek to ‘construct an international order in some form, presumably along lines that are compatible with its own international objectives and domestic structures.’⁶¹ To this end, the regional arrangement is perceived by the hegemon to be within its ‘sphere of influence’ and it will seek to underwrite the implementation of its regional objectives.⁶²

Hegemonic RTAs can be perceived to be an attempt to circumvent the rule-making at the multilateral level, with dominant members seeking to create a new system of rules at the regional or bilateral level. At the heart of the WTO system is the notion that all countries stand to gain from trade, although some will be more likely to gain than others. In an Orwellian sense, they are ‘all equal but some are more equal than others’. RTAs may be used as a policy tool for WTO Members to reassert their position and control in the global economy. Negotiating RTAs therefore carries with it the real risk of reinforcing and perpetuating structural inequalities between trade partners.

In the following section, cooperation under the Economic Partnership Agreements will be discussed. The EPAs are reciprocal North-South RTAs, negotiated between the EU and ACP countries, designed to ‘kick-start reform and help strengthen *rule of law in the economic field*,

⁵⁹ This paper uses the term ‘hegemony’ in a Gramscian sense, referring to the domination of one class over another. This approach understands hegemonic authority as being exercised through a combination of coercive and persuasive practices that allows a leader to rule with the consent of the subjugated classes.

⁶⁰ W.J.Ethier, ‘The New Regionalism’ (1998) *The Economic Journal* 108:449, 1151.

⁶¹ J.G.Ruggie, *Constructing the World Polity: Essays on International Institutionalism* (London: Routledge, 1998), 25.

⁶² A. Habib & N. Selinyane, ‘Constraining the unconstrained: civil society and South Africa’s hegemonic obligations in Africa’ cited in I.Taylor ‘South African ‘Imperialism’ in a region lacking Regionalism: A Critique’ (2011) *Third World Quarterly* 32:7, 1233-1253.

thereby attracting foreign direct investment, so helping to create a ‘virtuous circle’ of growth.’⁶³ By problematizing the scope and application of Article XXIV in the context of these agreements, the following section seeks to problematize the extent to which North-South RTAs promote development as a diverse process.

III. North-South RTAs as ‘drivers of development’?

Following the decision of *EC-Bananas III*, but keen to preserve its long-standing relationship with its former colonies, the EU offered reciprocal but *asymmetric* preferences under the Cotonou Agreement and, more specifically, through the EPAs. The primary purpose of the EPAs is to eradicate poverty and facilitate the gradual integration of ACP countries into the global economy through the project of regionalism.⁶⁴ These agreements mark an important paradigmatic shift in cooperation between the EU and ACP since trade facilitation and *reciprocal* market access are key pillars of the framework.

Article 1 of the Cotonou Agreement, in defining the scope of the EPAs, provides:

‘The partnership shall be centered on the objective of reducing and eventually eradicating poverty consistent with the objective of *sustainable development* and the gradual integration of the ACP countries into the world economy.’ (emphasis added)

This resonates with the EU’s external policy, as Article 130u TEU requires that Members ‘foster the sustainable *economic and social* development of the developing countries, and more particularly the most disadvantaged among them.’⁶⁵ Promoting human rights and democracy through trade has been part of the EU’s external policy since the early 1990s. Social clause have been integrated into FTAs as part of the effort to eradicate the harmful effects of ‘social dumping’ associated with globalisation and trade liberalisation.⁶⁶ By promoting a ‘development friendly’ approach to trade, social clauses are becoming more commonplace in FTAs so as to regulate against the potentially harmful social effects stemming from trade liberalisation.

⁶³ European Commission DG Trade, ‘Economic Partnership Agreements’ (undated) available at <<http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/>>. (emphasis added)

⁶⁴ Article 1 Cotonou Partnership Agreement OJ/L/317 (15 December 2000) as amended by the consolidated version OJ/L/287 (4 November 2010).

⁶⁵ Emphasis added.

⁶⁶ While there is no single definition of ‘social dumping’, the term generally refers to the practice of multinational corporations that ‘off-shore’ production to developing countries, where labour costs are considerably lower and the labour standards are often less restrictive than those in the home state. See: I. Hurtado & P. Argerey, ‘Social Dumping: The Debate on a Multilateral Social Clause’ (2008) 8 *Global Economy* Article 6, 2.

The legal bases for the incorporation of social clauses into FTAs is found in Article 21 of the Lisbon Treaty, which states:

‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: *democracy*, the *rule of law*, the universality and indivisibility of *human rights and fundamental freedoms*, respect for *human dignity*, the principles of *equality* and solidarity and respect for the principles of the UN Charter and international law’ (emphasis added).

Collectively, these provisions shows that the EU’s development policy incorporates the terms ‘poverty’ and ‘sustainable development’ as the *ends* of the development process. However, this is seemingly at odds with the EU’s concept of development as a discourse, which is narrowly focused on economic growth. For example, in its second draft submission to the WTO Negotiating Group on Rules, the EU emphasised the ‘development dimension’ of RTAs but states that regionalism can ‘play an important role in promoting *economic* development in so far as the agreements are sufficiently ambitious and take into account the specific needs and constraints of developing and least developed countries.’⁶⁷ A disconnect between the EU’s concept of development as a discourse and of development as a process is palpable.

EU development policy has long echoed that of the global financial institutions, and the EU perceives its development policy to be complementary to its trade strategy, each being seen as ‘two facets of the EU’s external identity.’⁶⁸ Much like the recent policies of the IMF and World Bank, the Cotonou Agreement encourages developing countries to ‘own’ their development process and to coordinate strategies to help eradicate poverty.⁶⁹ Political dialogue is an important element of the Cotonou Agreement and discussion on agreed priorities, shared agendas and issues of common interest, should be facilitated.⁷⁰ A key part of this strategy is to foster the ‘smooth and gradual integration of the ACP states into the world economy.’⁷¹ However, as development levels vary significantly across ACP countries reciprocal liberalization must be phased in gradually.⁷²

⁶⁷ European Commission, ‘Second Submission on Regional Trade Agreements by the European Communities’ Brussels, 26 April 2005, 2.

⁶⁸ European Commission, ‘Green Paper on Relations between the European Union and the ACP countries on the eve of the 21st Century: Challenges and Options for a New Partnership’ COM (96) 750 Final (1996), 3.

⁶⁹ Article 2 Cotonou Partnership Agreement.

⁷⁰ Article 8 Cotonou Partnership Agreement.

⁷¹ Article 34(1) Cotonou Partnership Agreement.

⁷² Article 34(2) Cotonou Partnership Agreement.

Reciprocity in the EU-ACP relationship benefits the EU significantly as, for the first time in its trade history, the EU will enjoy duty-free-quota-free access to ACP markets. This arrangement confers greater access than that granted under Lomé, where preferences were based on MFN or better, depending on the particular product. The EPAs overlap with existing regional initiatives, and requiring liberalization of ‘substantially all trade’ among an existing regional arrangement may cause friction between its members, as they try to agree which products should be included and excluded from the EPA. There is the possibility that each member of the regional configuration will select different products for liberalization in order to protect their respective ‘sensitive’ sectors.⁷³ Even where the same products are selected, complications could arise if different phase in periods are permitted for each country.

From the EU’s perspective, the very fact that the EPAs ‘lock-in’ ACP countries to binding regulations and extensive liberalization makes them ‘development friendly’ instruments. Furthermore, the EPAs, like many regional arrangements currently negotiated with the EU,⁷⁴ go beyond trade to include human rights clauses, social clauses, and labour standards. Creating a more stable economic environment that is more attractive to investors is a key goal of the EPAs. As confidence among investors grow and the financial environment stabilizes, it is expected that investment flows to the region will significantly increase. This investment cycle is one of the dynamic effects of the EPA structure. However, appropriate trade conditions will need to be in place to stimulate shifts in the patterns of investment and production in order to realise these effects. To this end, the extent to which the EPAs will stimulate investment in real terms is ambiguous. That the EPA will result in domestic ACP producers being ‘crowded out’ by more efficient EU producers keen to harness these potential economies of scale remains a real fear.⁷⁵ Nevertheless, economic growth and integration remain the key objectives of these agreements, while the promotion of other social rights is only a peripheral concern.

⁷³ C. Stevens, ‘The EU, Africa and EPAs: Unintended Consequences of Policy Leverage’ (2006) *Journal of Modern African Studies* 44, 445.

⁷⁴ For example, in its recently negotiated FTAs, the EU has incorporated ‘sustainable development’ chapters and social clauses in to the EU-Korea, EU-India and EU-Central America agreements.

⁷⁵ For example, see: ACP-EU Joint Parliamentary Assembly, ‘Replies Given to the Commission To Oral Questions’ 22nd Session of 21-23 November 2011, available at: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/acp/dv/replies_lome_/replies_lome_en.pdf> accessed on 20 March 2015; S.N.Karingi, ‘Interim Economic Partnership Agreements Point to the Classic Regional Trade Agreements After All: Should African Countries Really Be Worried?’ African Trade Policy Centre Working Paper No.75 (April 2009); D. Cronin, ‘EU Deals with Africa Could Violate Rights’ IPS online article (5 October 2007) available at: <<http://www.ipsnews.net/2007/10/trade-eu-deals-with-africa-could-violate-rights/>> accessed on 20 March 2015.

EPAs have been perceived to be controversial development tools because they require liberalization beyond that prescribed by the WTO. Since the negotiations began in 2004, the EU has pushed for the inclusion of so-called ‘new generation’ issues which includes liberalization of services, competition policy and investment policy.⁷⁶ The reluctance of developing countries to liberalise beyond trade in goods is well documented, culminating in the suspension of the Doha Round.⁷⁷ Failure to adopt a more aggressive liberalization policy could result in an undiversified production base in developing countries, where production is already predominantly monocultural. If supported in a meaningful way, liberalization into other sectors could open vast opportunities for developing countries in the ACP. The inclusion of ‘new generation’ issues leaves ACP countries in a precarious negotiating space but given the lacklustre growth experienced under Lomé, it seems indisputable that trade facilitation needs to move beyond tariff reduction for trade in goods.

It has been estimated that the adjustment costs for implementing the EPA framework will amount to at least €9 billion for the ACP.⁷⁸ Under the 9th European Development Fund (EDF), the ACP received approximately €650 million for the provision of trade related assistance, In spite of this notable shortfall, the EU Commission insists that there will be no separate financial envelope specifically designated for supporting EPA implementation in ACP countries.⁷⁹ Furthermore, the Aid for Trade element has been decoupled from the EPAs making any additional funding from the EU to implement the new reforms entirely voluntary. This substantially alters the dynamics of the trading relationship since the ACP countries will now need to implement the proposed institutional reforms and apply for funding without the promise of such funding being available. If funding is not guaranteed, the ACP will need to redirect their own domestic resources, usually generated through tariff revenues, to finance the implementation of the EPAs. Inevitably, the implementation of the EPA will result in less revenue generated through tariffs and as such there will be less money available to invest into improving infrastructure.

⁷⁶ A. Young ‘Trade politics ain’t what it used to be’: the European Union in the Doha Round’ (2007) *Journal of Common Market Studies* 45, 789-811.

⁷⁷ K.A.Jones, *The Doha Blues: Institutional Crisis and Reform in the WTO* (Cambridge University Press, 2010).

⁷⁸ A. Flint, ‘The End of a ‘Special Relationship’? The New EU-ACP Economic Partnership Agreements’ (2009) *Review of African Political Economy* 36, 80.

⁷⁹ ECDPM, ‘EPA Development Support: Possible Scenarios for EPA related support mechanisms’ ECDPM *In Brief* No. 16 (November 2006) available at: < <http://ecdpm.org/wp-content/uploads/2013/11/IB-16B-EPA-Development-Support-Scenarios-EPA-Support-Mechanisms-2006.pdf>> accessed on 20 March 2015.

In relation to Article XXIV:8, and the requirement to liberalise ‘other restrictive regulations of commerce’ for ‘substantially all trade’ in North-South RTAs, there is some concern in relation to the incidence of non-tariff barriers to trade. Barriers to trade do not come merely in the form of tariffs. Market access tools such as rules of origin, technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures are among some of the mechanisms that could distort trade under the EPAs.⁸⁰ For example, where a developing country or LDC suffers from structural and supply constraints they may not be in a position to meet the strict rules of origin requirements for exported products. Where this occurs, they will effectively be prevented from accessing the EU market on a duty-free-quota-free basis.⁸¹ Strict labelling requirements and health and safety standards place heavy restrictions on the production base in developing countries.⁸² The Taubira Report, commissioned by the French government during its EU Presidency, highlighted the deficiencies of the EPA and called for the European Commissioner to reconsider its position.⁸³ Taubira argued that the high food safety measures in operation in Europe constituted ‘more effective obstacles than tariffs’. However, it seems that little has been done to reform these processes at the EU level.

This article submits that the EPAs, as a regional development strategy, have the potential to promote economic unfreedom and erode other substantive freedoms. The projected implications of these North-South RTAs appears to go against the meaning of *sustainable* development, but this approach reinforces the EU’s discourse of development as a market-orientated process. In spite of unrelenting criticism, the European Commission remains unapologetic for the proposed scope of liberalization under the EPAs. It continues to see these regional arrangements as fundamental to the development process across the ACP, and notes that the ‘EPAs are part of the overall effort to build up the economic governance framework, the stable transparent and predictable rules necessary to lower the cost of doing business, attract fresh domestic or foreign investment and make ACP producers more diversified and competitive.’⁸⁴

⁸⁰ For a discussion on the impact of non-tariff barriers to trade for developing countries, see: A. Disdier, L. Fontagné & M. Mimouni, ‘The Impact of Regulations on Agricultural Trade: Evidence from the SPS and TBT Agreements’ (2008) *American Journal of Agricultural Economics* 90, 336-350.

⁸¹ A.I. Ukpe, ‘Will EPAs Foster the Integration of Africa into World Trade?’ (2010) *Journal of African Law*, 54:2, 215.

⁸² P. Goodison & C. Stoneman, ‘Europe: Partner or Exploiter? The G-90 and the ACP’ (2004) *Review of African Political Economy* 31, 730.

⁸³ For a discussion on the Taubira Report and its implications for the EPA negotiations, see: J. Senona, ‘EPAs and the Doha Round: Development or Discontent’ (2009) 8(1) *Journal of International Trade Policy* 60-83.

⁸⁴ European Commission cited in A. Storey ‘Normative Power Europe? Economic Partnership Agreements and Africa’ (2006) *Journal of Contemporary African Studies* 24:3, 341.

As North-South RTAs notified under Article XXIV, the EPAs highlight the structural inequalities that exist between the EU and the ACP States. The EPAs also serve as an example of how dominant members can use regional arrangements to protect their position. By participating in RTAs with the EU, the ACP are at risk of becoming ever more dependent on its former colonial master:

‘The risk to the group remains that of perpetuating the unhealthy postcolonial dependence on Europe for development aid and fiscal support, which unfortunately authors further neoliberal market integration, trade liberalisation and privatisation of State-owned enterprises.’⁸⁵

There appears to be a real disjuncture between the rhetoric of the EU in terms of its development policy, and the manner in which its development policy is executed. Fearing that the 2008 negotiating deadline would not be met, the EU offered duty-free-quota-free access to those regions negotiating towards full EPAs under EU Regulation 1528/2007.⁸⁶ It seems to be the intention of this Regulation to ‘lock in’ ACP countries into the EPA process. However, the EU threatened to withdraw access under the Regulation to eighteen negotiating parties unless they took appropriate measures towards ratifying the EPAs by 1 January 2014.⁸⁷

The effect of withdrawing preferences under the Regulation would have affected countries in different ways, depending on whether they have ‘developing’ or ‘LDC’ status. For LDC countries, duty-free-quota-free access would remain available under the EU’s ‘Everything But Arms’ Initiative, and some may benefit from the GSP+ programme.⁸⁸ However, developing countries removed from the Annex to the Regulation would have to trade under the revised GSP which means that some of their products would be subject to duties. For countries such as Namibia and Botswana, classified as ‘upper middle’ income, they fall outside the scope of GSP and would therefore have to access the EU market on MFN tariff levels. In real terms, it is estimated that this would have cost Namibia almost €60 million per annum, as the EU is its

⁸⁵ R.Kamidza, ‘SADC EPA Information Seminar Failed Civil Society’ *SEATINI Bulletin* 10:7 (16 July 2007) available at: <<http://www.seatini.org/bulletins/pdf/2007/10.07.pdf>>.

⁸⁶ European Council Regulation No 1528/2007 of 20 December 2007, L/348/1.

⁸⁷ See, L.Bartels, ‘Legal Constraints on the EU’s ability to withdraw EPA preferences under Regulation 1528/2007’ ECDPM *Briefing Note* No 27 (October 2011) available online at <<http://ecdpm.org/publications/legal-constraints-eus-ability-to-withdraw-epa-preferences-under-regulation-15282007/>> accessed on 20 March 2015.

⁸⁸ For a comprehensive discussion of the EU’s programme of GSP, and relevant documentation, see: European Commission, ‘Generalised Scheme of Preferences’ online at <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm> accessed on 20 March 2015.

largest export destination after South Africa.⁸⁹ However, the southern African countries have managed to negotiate a full EPA and this economic shortfall has been avoided.

Stephen Hurt explores the degree of consent and coercion present in the EU-ACP relationship and argues that the promotion of ‘partnership’ and ‘dialogue’ where the ACP countries ‘own’ their development process is little more than a façade. Offering the EPAs as the *only* alternative to Lomé preferences illustrates the power asymmetry in the EU-ACP relationship, and the EU has used the WTO legal framework a coercive tool to manipulate that relationship:

‘The use of the WTO as the major justification is understood not as a simple “reason” in this case, but as a strategic attempt by the EU to externalize responsibility for its own policy. What has been shown to be an essentially coercive policy direction does not require domestic consensus if it can be shown that it is the only alternative.’⁹⁰

In spite of its emphasis on partnership, the Cotonou Agreement supports the EU’s neoliberal model of development as it stresses the importance of ensuring that ‘cooperation’ leads to a ‘favourable environment for private investment and the development of a dynamic, viable and competitive private sector.’⁹¹ Furthermore, ‘cooperation’ should support the implementation of ‘structural policies designed to reinforce the role of different actors, especially the private sector.’⁹² Of course, the importance of the private sector should not be underestimated in terms of stimulating economic development but their role in promoting unfreedoms must not go unnoticed.

IV. Overcoming the development deficit: A way forward?

The EPA negotiations illustrate the complex nature of liberalization under North-South RTAs, and because each Member has a different status of social, economic, and human development, each Member is likely to feel the impacts of reciprocal trade differently. Securing special and differential treatment, while ensuring that the EPAs were WTO compatible, was a significant challenge for the negotiators. The negotiating process has also highlighted the need for flexibility in North-South RTAs, to ensure the gradual integration of developing countries into the world economy. Developing countries have voiced their concern about the requirement to

⁸⁹ Africa Europe Faith and Justice Network ‘EU Wants to Force ACP Countries to Sign EPAs’ (undated) available online at: < <http://aefjn.org/index.php/352/articles/european-commission-wants-to-force-acp-countries-to-sign-epas.html>>.

⁹⁰ S. Hurt, ‘Cooperation and Coercion? The Cotonou Agreement Between the EU and ACP States and the End of the Lomé Convention’ (2003) *Third World Quarterly* 24, 163.

⁹¹ Article 21 Cotonou Partnership Agreement.

⁹² Article 22 Cotonou Partnership Agreement.

shift from non-reciprocal preferences to reciprocal trade, and on 28 April 2004, the ACP States submitted a proposal to the WTO Negotiating Group on Rules requesting a reinterpretation of Article XXIV in relation to North-South RTAs.⁹³

At the heart of the ACP proposal was the idea that special and differential treatment could become a recognised element of the ‘substantially all trade’ requirement and with respect to ‘other restrictive regulations of commerce’.⁹⁴ Calling for clarification of the rules relating to RTAs, the ACP Group proposed that regionalism should ‘not pose unduly restrictive constraints on economic integration efforts of developing countries being pursued as part of their fundamental development strategy’.⁹⁵ The historically situated nature of Article XXIV is identified, noting that this provision was negotiated at a time where there were very few, if any, North-South RTAs. Noting the ‘*de facto* flexibility’⁹⁶ in Article XXIV, the ACP Group argued that the lack of a specific SDT element in this provision is detrimental to meaningful development in North-South RTAs. The ACP Group proposed that Article XXIV, in the context of North-South RTAs, should require less than reciprocity and greater flexibility, by explicitly incorporating SDT into the legal framework.⁹⁷

Perhaps unsurprisingly, WTO Members rejected the ACP Group’s submission, and in particular, Japan stated that the ‘time was not yet ripe’ to engage in this discussion because the rules had not yet been clarified in full by the Negotiating Group on Rules.⁹⁸ While some WTO Negotiating Group on Rules noted that some Members believed Article XXIV should incorporate the ‘least amount of flexibility’ because it is an exception to the fundamental principle of MFN. Interestingly, in footnote 1 to the submission, Japan states that it considers all negotiating parties to be on ‘equal footing’ when it negotiates RTAs, and therefore ‘there is little room for S&D treatment’.⁹⁹

⁹³ ACP Submission, ‘Development aspects of regional trade agreements and special and differential treatment in WTO rules: GATT 1994 Article XXIV and the Enabling Clause’ TN/RL/W/155 of 28 April 2004. For a comprehensive discussion of this Proposal and of the responses received from the WTO Negotiating Group on Rules, see: B. Onguglo and T. Ito, ‘In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV’ ECPDM Discussion Paper No. 67 (October 2005).

⁹⁴ In their submission, the ACP States also requested that special and differential treatment be incorporated into the procedural aspects of RTAs, such as notification to the CRTA.

⁹⁵ ACP submission, see above n 88, para 3.

⁹⁶ *Ibid*, para 8.

⁹⁷ *Ibid*, para 10-12.

⁹⁸ WTO Negotiating Group on Rules, ‘Submission on Regional Trade Agreements: Japan Comments on the ACP Paper TN/RL/W/155’, TN/RL/W/165 of 8 October 2004, para 1.

⁹⁹ *Ibid*, n 1.

The dialogue between WTO Members at an early stage of the EPA negotiations demonstrates a willingness to preserve the historically situated analysis of Article XXIV and suggests that the proposal to reinterpret Article XXIV was a threat to the existing mantra of the WTO. This article has sought to highlight that the meaning of Article XXIV, and the ‘substantially all trade’ requirement, has been rationally constructed on the basis of historically situated discussions and Members have been unwilling to adopt alternative interpretations. Furthermore, the textual approach of the Dispute Settlement Body in the interpretation of Article XXIV has limited the negotiating space of developing countries in North-South RTAs. Without a major modification to the language of Article XXIV through a renegotiation of the GATT, there seems little opportunity for redefining this provision in a way that embodies a more inclusive concept of development. The reluctance of Members to engage in meaningful discussions about the challenges posed by the inflexible language of the GATT, and to explore alternative interpretations, is merely symptomatic of the formalist system under which the legal framework has been negotiated.

Arguably, the definitional boundaries of Article XXIV may not be perceived to be a crucial concern in North-South negotiations. Given the lack of jurisprudence in the DSB, Members can rely on the lack of clarity to ask for longer phase in periods and less coverage. However, significant power disparity between WTO Members continues to exist. This leads us to question what alternative might be used to embed freedom within the trade paradigm. One such alternative is to link trade concessions to international standards on human rights and labour standards through the inclusion of social clauses. The debate on social clauses has existed since the Seattle Ministerial Conference, and while some WTO Members are seeking to include social clauses and development chapters into North-South FTAs, the effect of these measures for development remains ambiguous.¹⁰⁰

The CARIFORUM EPA, for example, is coined as a ‘Trade Partnership for Sustainable Development’, and sets its first objective as ‘contributing to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development.’¹⁰¹ However, the concept of ‘sustainable development’

¹⁰⁰ A.Chan & R.Ross, ‘Racing to the Bottom: International Trade Without a Social Clause’ (2003) *Third World Quarterly*, 24:6, 1011-1028.

¹⁰¹ Article 1 EU-CARIFORUM EPA.

is itself vague¹⁰² and the EU's approach towards development lacks coherence. In short, the question remains as to whether the inclusion of development objectives goes beyond mere rhetoric. The extent to which social clauses and development chapters improve standards in the developing country setting has been subject to scrutiny for some time.¹⁰³ Enforcement of these rights also remains contentious, with some arguing that social provisions in EU FTAs are to be treated as 'objectives to be achieved', rather than legally binding commitments.¹⁰⁴ This certainly appears to be the case in the context of the EPAs. Given the EU's aggressive trade agenda and ambiguous development model, this is perhaps unsurprising.¹⁰⁵ The treatment of these provisions, and the extent to which EPA countries seek to rely on their terms, is yet to be seen. If we are to see a real shift in the development discourse, there needs to be a correlative shift in legal discourse.

Concluding Remarks

This article has shown that the neoliberal economic paradigm, which is supported by a formalist legal framework, is seemingly at odds with the discourse of development as freedom. That said, important lessons should be learned from the EPA negotiations.

This paper sought to problematize the concept of regionalism as a development strategy by drawing attention to the assumptions on which the concept has been constructed. The legal framework has been narrowly defined, which has served the purpose of reinforcing narrow conceptions of development as a neoliberal discourse. Although special and differential treatment is a core part of the WTO architecture, Article XXIV is couched in neutral terms and as such does not incorporate a 'development' dimension. While the ACP issued a

¹⁰² An oft-cited starting point for defining sustainable development is the Brundtland Report, which defines this term as 'meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs'.

¹⁰³ D.Ashiagbor, 'Embedding Trade Liberalization in Social Policy: Lessons from the European Union?' (2011) *Comparative Labour Law and Policy Journal* 32:2; L. van den Putte and J. Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) *International Journal of Comparative Labour Law and Industrial Relations* 31:3, 263; J.Adriaansen & M.González-Garibay 'The Illusion of Choice: The European Union and The Trade-Labor Linkage' (2013) *Journal of Contemporary European Research* 9:4, 542-559.

¹⁰⁴ J. Vandenberghe, 'On Carrots and Sticks: The Social Dimension of EU Trade Policy' (2008) *European Foreign Affairs Review* 13:4, 561-581.

¹⁰⁵ K. Ulmer, 'Trade Embedded Development Models' (2015) *International Journal of Comparative Labour Law and Industrial Relations*, 31: 305-329.

communiqué¹⁰⁶ to the WTO members calling for Article XXIV to be redrafted in a way that incorporates SDT elements,¹⁰⁷ this has so far proven fruitless.

There is no consensus as to what Article XXIV, and in particular paragraph 8, requires for the creation of a regional arrangement. Furthermore, the jurisprudence from the Dispute Settlement Body shows the reluctance of the Panel and Appellate Body to engage in any meaningful dialogue about what conditions must be met in order to meet the requirements of Article XXIV. This article has shown that the legal framework fails to take into account the qualitative nature of regionalism and does not provide flexibility to accommodate for complex social processes that constitute regional processes. That various RTAs have been granted status without coming close to meeting the spirit of Article XXIV further illustrates the formalist approach embedded at the multilateral level. Adopting a formalist interpretation of the text of Article XXIV creates rigid boundaries which constrains the choices Members can make when negotiating new regional spaces.

It is generally accepted that the language of Article XXIV is of ‘sub-optimal clarity’¹⁰⁸ and this paper proposes that Article XXIV should be reinterpreted in a way that accommodates for greater flexibility in terms of market liberalisation for developing countries in ‘North-South RTAs. In light of the ongoing challenges facing the multilateral system post-Bali, it seems unlikely that the WTO members would reach a consensus on redrafting Article XXIV with a development dimension.

The deleterious effects of regionalism as a development strategy are being felt by ACP countries in the EPA negotiations with the EU. Conceptualised as ‘drivers of development’ it appears that these North-South RTAs perpetuate economic and social unfreedoms while deepening existing structures of dependency. Whether the EPAs are a modern form of ‘economic recolonization’ is open for debate, but there is certainly an ‘imperial flavour’ to the

¹⁰⁶ B. Onguglo & T. Ito ‘In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV’ (ECDPM Discussion Paper 67) accessed on 10 January 2015 and available online at: <<http://ecdpm.org/publications/in-defence-ACP-submission-on-special-and-differential-treatment-in-gatt-article-xxiv/>>.

¹⁰⁷ The problematic nature of SDT has been well documented and it is not the purpose of this paper to restate those arguments. See: P.Coconi & C Perroni, ‘Special and Differential Treatment of Developing Countries in the WTO’ 14 (2015) *World Trade Review*, 67; B.Hoekman, ‘Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment’ (2005) *JIEL* 8, 405; J.Whalley, ‘Special and Differential Treatment in the Millenium Round’ (1999) *World Economy* 22, 1065.

¹⁰⁸ Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* WT/DS34/R, adopted 19 November 1999, para 9.97.

new trade regime.¹⁰⁹ This article has argued that trade can lead to emancipation but we need to break free from the yokes of market-based assumptions in order to realise substantive freedoms. Opening our eyes to other possibilities is the only way to transform the law and development discourse.

¹⁰⁹ B.Hettne & F.Söderbaum, 'Civilian Power or Soft Imperialism: The EU as a Global Actor and the Role of Interregionalism' (2005) *European Foreign Affairs Review* 10:4, 535-552.